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In the Supreme Court of the United States

October Term, 1966
No. 255

THE CITIES OF CANTON, CLEVELAND AND MASSILLON
Petitioners,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO
and
THE EAST OHIO GAS COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF RESPONDENT THE EAST OHIO GAS COMPANY IN OPPOSITION

OPINIONS BELOW

The Findings and Order of The Public Utilities Commission of Ohio ("Ohio Commission") dated November 20, 1964, are attached to the Petition herein filed by the Cities of Canton, Cleveland and Massillon, Ohio ("Cities' Petition") as Appendix A. The Findings and Order of the Ohio Commission dated November 23, 1964, are attached to the Cities' Petition as Appendix B.

The opinion of the Supreme Court of the State of Ohio affirming the Ohio Commission's foregoing Orders is attached to the Cities' Petition as Appendix C and is reported as *City of Akron v. Public Utilities Commission of Ohio, City of Canton v. Public Utilities Commission of Ohio*, Nos. 39381 and 39385, at 5 Ohio St. 2d 237 and 215 N.E.2d 366 (1966).

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 23, 1966. The Cities' Petition herein was filed on June 20, 1966. It seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

The Cities' Petition asserts that the question presented for review is (Cities' Petition, p. 3):

> "Are rate payers entitled to due process of law in the setting of rates by State regulatory bodies?"

This is purely an abstract question. It was never ruled on by the Supreme Court of Ohio. The only question presented by the Cities' Petition is:

> Did the Supreme Court of Ohio err in holding that the November, 1964, rate fixing orders of the Ohio Commission were not against the manifest weight of the evidence?

This is not "a federal question of substance" (Rule 19(a)).

COUNTER-STATEMENT OF THE CASE

The "Statement of the Case" contained in the Cities' Petition (pp. 3-12) fails to set forth a concise statement of the case containing the facts material to the consideration of the question presented (Rule 23(e)). The facts are as follows:

A. The Nature of the Proceedings

The East Ohio Gas Company ("East Ohio") is a state-regulated public utility serving natural gas to consumers in and adjacent to 131 incorporated municipalities located in 13 counties in northeastern Ohio, the largest of which are Cleveland, Akron, Canton and Youngstown. The pro-

ceedings with which the petition herein is concerned commenced on August 1, 1961, when East Ohio filed with the Ohio Commission an application for increased rates covering consumers in and adjacent to 108 of the municipalities served, being all the territory served by East Ohio except that located in Lake and Ashtabula Counties, Ohio.

Ohio rate making law requires the Ohio Commission to make a finding of a gross valuation of the properties involved from which is subtracted existing depreciation to arrive at the statutory rate base. This rate base is then multiplied by a fair and reasonable rate of return for the utility. The resulting annual return, when added to the reasonable annual expenses of the utility, including taxes, is the allowable gross annual revenues which the rates fixed by the Ohio Commission must yield. (Ohio Rev. Code §§ 4909.04, 4909.05 and 4909.15; *City of Cleveland v. Public Utilities Commission of Ohio*, 164 Ohio St. 442, 132 N.E.2d 216 (1956)).

East Ohio's application, as required by Ohio Rev. Code § 4909.18, contained its appraisal of the value of the properties involved and a statement of its operating costs and other expenditures and its proposed new rates.

Following the filing of East Ohio's application there were various preliminary proceedings, including proceedings to determine a method of selecting locations for the inspection of East Ohio's underground pipe lines, which ended in the Supreme Court of Ohio. *City of Canton v. Public Utilities Commission of Ohio*, 174 Ohio St. 373, 189 N.E.2d 126 (1963); see Cities' Petition, App. C. pp. 63-64.

Throughout the period of these preliminary proceedings the Ohio Commission, through its staff, was making the investigation required by Ohio Rev. Code § 4909.19 which in pertinent part provides as follows:

> "Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code . . . *the commission shall at once cause an investigation*

to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within fifteen days after the filing of such application, or within such additional time as the commission orders, a written report shall be made and filed with the commission, a copy of which shall be sent by registered mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such reports is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable."*

On May 14, 1963, the written report so required, entitled "Case No. 30,311; The East Ohio Gas Company, Cleveland, Ohio, Staff Report of Investigation by The Public Utilities Commission of Ohio," was filed. During the 30-day period following the filing of this statutory report East Ohio and various cities filed objections thereto as permitted by Ohio Rev. Code § 4909.19.

On June 13, 1963, the Ohio Commission issued an entry scheduling the hearing of testimony beginning on July 9, 1963. Public hearings commenced on that date and continued intermittently for some 113 hearing days and involved 11,692 pages of testimony. Four cities (Akron, Canton, Cleveland and Massillon), in addition to East Ohio and attorneys for the Ohio Commission, participated in the hearings. The Ohio Commission presented 6 wit-

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*Emphasis by way of italics has been supplied throughout.

nesses and 13 exhibits which included the Staff Report and all of its engineers' working papers relating thereto. East Ohio presented 10 witnesses and 72 exhibits. As noted by the Supreme Court of Ohio (Cities' Petition, App. C, p. 64):

> "The length of time consumed by these hearings has been stated. It is observed throughout the record that extreme latitude was granted to counsel for the cities at all times. One company witness was cross-examined for 33 days."

The three Cities also presented numerous witnesses and exhibits. In all the Ohio Commission "received and considered 264 exhibits" (Cities' Petition, App. C, p. 62). Hearings were finally concluded on May 27, 1964.

Thereafter briefs were filed by East Ohio and the participating cities and on November 20, 1964, the Ohio Commission filed its Findings and Order granting East Ohio about half of the increase in revenue it had applied for (Cities' Petition, App. A). East Ohio thereupon filed revised rate schedules designed to yield the increased revenue so fixed and these were approved by the Ohio Commission in its Findings and Order of November 23, 1964 (Cities' Petition, App. B).

The four participating cities filed motions for rehearing with the Ohio Commission as a prerequisite to an appeal to the Supreme Court of Ohio (Ohio Rev. Code § 4903.11), which motions were overruled on January 18, 1965. Thereafter the orders of the Ohio Commission were appealed to the Supreme Court of Ohio, by Akron in one appeal and by the three Cities in another. The Ohio Commission was named as appellee and East Ohio was permitted to intervene. Briefs were filed by the respective parties in both appeals and oral arguments were heard on November 24, 1965. The Supreme Court of Ohio filed its opinion and entered its judgment unanimously affirming the Ohio Commission's Orders on March 23, 1966 (Cities' Petition, App. C).

B. The Valuation Fixed by the Ohio Commission and Approved by the Supreme Court of Ohio

As noted above, Ohio Rev. Code § 4909.19 requires the Ohio Commission to make an investigation of, and file a written report concerning, the matters set forth in an application for increased rates. This written report is commonly known in Ohio as the Staff Report. The required investigation was made during the period commencing on August 1, 1961, and ending with the filing of the report on May 14, 1963. During that almost two-year period various members of the staff of the Ohio Commission participated in the investigation and in the writing of the Report. The Report consisted basically of two sections, accounting and engineering. The accounting section detailed the expenses which East Ohio had incurred and which the staff deemed reasonable during the one-year test period fixed by an order of the Ohio Commission. The engineering section contained the staff's estimate of the statutory valuation of East Ohio's properties which were involved. (PUCO Exs. 2A and 2B, Tr. 1391, 9656; Additional Record of Appellee The East Ohio Gas Company, Volume II—Exhibits, pp. 152-203.) During this period the Chief Engineer of the staff was Mr. Paul R. Hampton. Mr. Hampton left the staff shortly thereafter and was replaced by Mr. Norbert R. Patton.

The evidence before the Ohio Commission consisted of the Staff Report, the testimony and exhibits of various staff members, the testimony and exhibits of East Ohio and the testimony and exhibits presented by the three Cities.

The gravamen of the three Cities' Petition herein is stated at pages 4 and 5 of the Petition as follows:

> "There is a difference of over $114,000,000 between the valuations submitted by the Petitioners through their experts and the unsupported valuation attributed to the phantom Hampton. By choosing the

higher Hampton valuation the Commission deprived the Petitioners of due process of law."

As to the gross valuation, East Ohio's valuation was $499,393,956 and the Staff Report's valuation was $496,031,897 (Additional Record of Appellee The East Ohio Gas Company, Volume II—Exhibits, p. 154). As to this difference the Staff Report had this to say (id. at p. 156):

> "Under the circumstances we believe this degree of agreement indicates that either result should be acceptable."

As to the three Cities' evidence, which presented a gross valuation of $421,970,604, most of the difference in their valuation from East Ohio's valuation and the Staff Report valuation was accounted for by the pipe laying labor cost estimates of City Witness Arnold. His testimony was carefully considered by the Ohio Commission and found unsatisfactory and not in accordance with the Ohio valuation statutes. (Cities' Petition, App. A, pp. 35, 37-38.)

As to the amount of the existing depreciation to be deducted under the Ohio statutes to determine the statutory rate base, East Ohio and the Ohio Commission staff used the results of the inspections of the pipe lines and other properties. The three Cities used actuarial methods to determine what was in effect a reserve for depreciation which under the Ohio law is not the proper method of determining existing depreciation (Cities' Petition, App. A, pp. 40-45).

The final net property valuation fixed by the Ohio Commission was $395,849,042 (id. at p. 46). It followed the Staff Report and the valuation exhibits of staff members in large part, although as to certain properties it followed East Ohio's valuation where it was lower. It was

about $13,500,000 lower than that claimed by East Ohio and supported by extensive testimony on both direct and prolonged cross-examination (id. at p. 30).

As to all this evidence on valuation and the three Cities' claims before the Supreme Court of Ohio that only their valuation should have been the one fixed by the Ohio Commission, that Court said (Cities' Petition, App. C, pp. 65-66):

> "Lumped with these specific objections [rulings on evidence] were arguments that the commission's failure to rely upon the opinions of the cities' experts admitted and/or the commission's exclusion of the opinions of the cities' experts in matters concerning reproduction-cost-new of the inventory and/or the commission's greater reliance upon the report of its own staff or company witnesses in this area somehow amounted to lack of due process. . . .
>
> "The remainder of the appellants' contentions and arguments in this area relate to judgments by the commission in weighing the evidence. This court has repeatedly held that it will not substitute its judgment for that of the commission as to conclusions drawn from evidence, unless the findings and order of the commission are manifestly against the weight of the evidence or there is no evidence. *City of Kenton v. Pub. Util. Comm.*, 3 Ohio St.2d 71, 73. *There is evidence supporting all aspects of the order appealed from and no finding of the commission is against the manifest weight of the evidence.*"

In essence what the three Cities are asking this Court to review is the determination of the Supreme Court of Ohio as to the manifest weight of the evidence. The final valuation adopted by the Ohio Commission was more than supported by East Ohio's evidence, and was not challenged by

competent and credible testimony of the three Cities.* The amount of this valuation as determined by the Ohio Commission on the whole record before it and approved by the Supreme Court of Ohio does not present a federal question.

ARGUMENT

Rather than discuss the only question their Petition might conceivably present, the three Cities claim they were somehow denied due process of law because an ex-member of the Ohio Commission's staff did not attend the hearings. They argue that the former Chief Engineer of the Ohio Commission at the time the Staff Report was prepared, Mr. Hampton, "neither gave any direct testimony nor was made available for cross-examination" (Cities' Petition, p. 4). They refer to Mr. Hampton as a "phantom" (Cities' Petition, pp. 4, 14).

These claims of the Cities are completely unwarranted. It is not true that Mr. Hampton was not "available for cross-examination." The three Cities could have cross-examined Mr. Hampton if they had so desired.

The simple answer to the three Cities' claim is that no one can complain of lack of due process if he does not use the rights accorded him by law to secure and cross-examine witnesses he claims he would like to have cross-examined. E.g. 5 WIGMORE, EVIDENCE § 1371 at 51 (3d ed. 1940). Plainly the three Cities' failure to cross-examine Mr. Hampton was because they simply did not want to do so. Obviously his testimony would have again supported the view expressed in the Staff Report. See page 7, *supra*.

*Under Ohio utility law, as in most states and as before most federal administrative agencies, it is not the duty of the regulatory agency to prove the statutory report to objectors thereto but rather the duty of the objectors to present "credible, authoritative and challenging" evidence in support of their objections (Cities' Petition, App. C, p. 66).

Pursuant to Ohio law, the Staff Report was competent evidence the moment it was introduced (Cities' Petition, App. C, p. 66).

If the three Cities had really wanted to examine Mr. Hampton or any other witnesses* concerning the Staff Report (and under Ohio law such witnesses could have been cross-examined after being called, Ohio Rev. Code § 2317.43 (Uniform Reports as Evidence Act); *cf.* Ohio Rev. Code § 2317.37 (Uniform Composite Reports as Evidence Act)), they had ample opportunity and statutory authority under Ohio law to subpoena them or take their testimony by deposition.

Rule 1.15 of the Code of Rules and Regulations of The Public Utilities Commission of Ohio (1962) provides in material part as follows:

> "Subpoenas requiring the attendance of witnesses from any place in the State of Ohio to the designated place of hearing, for the purpose of taking the testimony of such witnesses orally before one or more members of the Public Utilities Commission, any Attorney Examiner, or by deposition before an officer authorized to take the same, will upon written application of any of the parties with good cause having been shown and subject to relevance and materiality to the issues involved, or upon the order of the Commission directing the taking of such testimony, be issued by any member of the Commission."

Ohio Rev. Code § 4903.04 provides:

> "If a person disobeys an order of the public utilities commission or a public utilities commissioner, or a subpoena, or if a witness refuses to testify to any

*The Cities did cross-examine five members of the Ohio Commission's Staff with respect to the Staff Report.

matter regarding which he may be lawfully interrogated, the court of common pleas of a county or a judge of such court, on application of a commissioner, shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein. The commission shall also have the powers vested in notaries public to compel witnesses to testify and to produce books and papers."

And Ohio Rev. Code § 4903.06 provides:

"In an investigation, the public utilities commission or *any party to the investigation may cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed for depositions in civil actions in the court of common pleas.*"

Clearly no federal question can be raised in these circumstances. As we have noted, the three Cities really claim that the Ohio Commission should have adopted the valuation evidence offered by the three Cities' witnesses rather than that of its own staff which was more than substantiated by the extensive valuation testimony and exhibits of East Ohio's witnesses.

The fact that the absence of Mr. Hampton can be directly attributable to the Cities' failure to use the processes available to them under Ohio law probably explains the three Cities' failure to comply with Rule 23(f) of this Court which requires petitioners to specify the stage in the proceedings before the Ohio Commission and the Supreme Court of Ohio, the manner in which, and the method in which, the alleged federal question sought to be reviewed was raised and the way in which it was passed upon with pertinent quotations from the record and specific references.

Since the three Cities cannot show that the absence of Mr. Hampton could conceivably have resulted in a denial of due process of law, the question they claim is raised here—whether rate payers in a proceeding in which the state exercises its police powers to set maximum rates which a utility may charge are entitled to due process—is nothing more than an abstract proposition wholly unrelated to the proceedings and orders they seek to have this Court review. In fact, the three Cities were granted the last full measure of due process. As stated by the Supreme Court of Ohio (Cities' Petition, App. C, p. 64):

> "It is observed throughout the record that extreme latitude was granted to counsel for the cities at all times."

As we have also noted, since this abstract proposition was never ruled on by the Supreme Court of Ohio adversely to the contention of the three Cities, no basis for jurisdiction over such a question can be found in 28 U.S.C. § 1257. *E.g. Lynch v. New York ex rel Pierson,* 293 U.S. 52 (1934). Simply stated, no federal question was properly presented and passed upon below and none is raised presently by the three Cities.

We observe in closing that the three Cities' reliance on and quotation of what they term "paragraphs eight through ten of the syllabus" of this Court's decision in *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio,* 301 U.S. 292 (1937) (Cities' Petition, pp. 13-14), is misplaced and irrelevant. As stated by the three Cities, the Ohio Commission in that case based certain portions of its required valuation of the utility's property on price trends of which it took administrative notice after the close of the hearings. In the present proceedings, where valuations which were adopted by the Commission were based upon trends, the trends used were detailed specifically in the record through-

out the hearings and in many instances were the same trends availed of by the three Cities in their final valuation claims. As noted in the *Ohio Bell* case by Mr. Justice Cardozo (301 U.S. at 302):

> "When price lists or trade journals or even government reports are put in evidence upon a trial, the parties against whom they are offered may see the evidence or hear it and parry its effect."

The Ohio Commission in the proceedings here involved followed exactly the admonition expressed by this Court.

CONCLUSION

For the foregoing reasons, the Cities' Petition should be denied.

Respectfully submitted,

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July 15, 1966